U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 September 2007

BALCA No.: **2007-INA-00021**
ETA Case No.: P-04253-03429

In the Matter of:

VENKATA RAO MULPURI,
Employer,

on behalf of

TIRUMALA RAO KODE,
Alien.

Certifying Officers: Stephen W. Stefanko
Barbara Shelly[1]
Philadelphia Backlog Elimination Center

Appearances: Keshab Raj Seadie, Esquire
Stephanie Weaver, Esquire
Eunhae Bae, Esquire[2]
Jersey City, New Jersey
For the Employer and the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

[1] Stephen Stefanko issued the May 26, 2006 Notice of Findings. Barbara Shelly issued the February 5, 2007 Final Determination and the May 2, 2007 Reconsideration Denial, and forwarded the Appeal File to the Board.

[2] Keshab Raj Seadie submitted the ETA Form 750 and the January 9, 2007 request for review. Stephanie Weaver and Eunhae Bae are attorneys in Keshab Raj Seadie's law firm and submitted briefs on his behalf. Stephanie Weaver submitted the June 29, 2006 rebuttal to the Notice of Findings and Eunhae Bae submitted the June 15, 2007 legal brief in response to the Notice of Docketing.

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[3] We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

BACKGROUND

The Employer submitted this application for permanent alien labor certification for the position of Domestic Cook. (AF 37). The CO issued a Notice of Findings ("NOF") on May 26, 2006, stating the intent to deny the application based on the job opportunity not being clearly open to U.S. workers in violation of 20 C.F.R. § 656.20(c)(8). The CO found that the Employer did not provide sufficient information for the CO to determine whether the position of Domestic Cook was a bona fide job opportunity that constituted full-time work, or if the job was created solely for the purpose of qualifying the Alien as a skilled worker, rather than an unskilled worker, for the purpose of reducing the time necessary to obtain a visa. (AF 35). The CO requested that the Employer rebut this ground by answering a series of questions and providing supporting documentation.

The Employer submitted a rebuttal to the CO's NOF on June 29, 2006. The Employer stated that the Alien's duties would be strictly limited to being a Domestic Cook. (AF 10). The Employer asserted that properly preparing vegetarian Indian meals is

[3] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

time-consuming, and difficult for the family itself to handle due to their busy schedules. The Employer explained that the Alien would be making a minimum of nine meals a day (three meals a day for three family members) in addition to shopping for groceries, preparing pastries and assisting with household entertainment. (AF 11). The Employer also provided a daily schedule of the family.

On December 8, 2006, the CO issued a Final Determination denying the application. The CO found that the Employer failed to prove that the job opportunity actually existed, and was not created for qualifying the Alien as a skilled worker. Also, the CO found that the proposed work schedule of the Alien conflicted with the schedule of the family. The CO observed that the cook purportedly would be required to prepare breakfast, lunch and dinner, but would arrive three hours after the family leaves in the morning. In addition, the Employer did not submit an entertainment schedule to justify the need of a cook to help with home entertainment. (AF 6).

By a letter dated January 9, 2007, the Employer requested review by BALCA. The Employer stated that the job is an actual full-time position. The Employer argued that the Alien would prepare the following day's breakfast and lunch during the day in addition to preparing dinner for the family during the evening. The cook would also be responsible for cleaning the kitchen and utensils. (AF 2-3).

In response to the Employer's request for review, the CO forwarded the matter to this Board on April 6, 2007. The Board issued a Notice of Docketing on May 31, 2007. The Board received a statement of position from the Employer on June 18, 2007. The Employer reiterated its previous statements that due to the family's busy schedules and entertaining of guests the household needs a Domestic cook. The Employer also reiterated that the job is full-time, since in addition to preparing dinner, the Alien would also prepare the next day's breakfast and lunch.

DISCUSSION

In Carlos Uy III, 1997-INA-304 (March 3, 1999)(en banc), the Board heard a similar case to this matter in which the Employer was also trying to hire a domestic cook. In Carlos Uy III, the Board applied a totality of circumstances test, taking into account all the factual circumstances of the case before it to determine whether the job was clearly open to U.S. workers and constituted a *bona fide* job opportunity for full employment. The case listed several possible issues that the Board can examine when using the totality of circumstances test.

One such issue considered in the totality of circumstances test is the strong motive for employers to attempt to designate jobs as skilled when they are really unskilled positions, in order to get a visa quickly for the Alien. In the NOF in the instant case, the CO states:

> Under the immigration law, the number of immigrant visas available to "unskilled workers (aliens granted labor certification in occupations requiring less than two years of experience) is very limited. As a result, lengthy visa waiting period [sic] often result, making immigrant visas virtually unavailable for unskilled workers. On the other hand, there is no current waiting period for most immigrant visas in the "skilled worker" category (aliens granted labor certification in occupations requiring at least two years of experience).
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> According to the Dictionary of Occupational Titles (DOT), almost all household positions are classified as "unskilled" because the occupations require much less than two years of training, education and/or experience for proficiency. For example, 30 days to three (3) months is required for a Houseworker. The occupation of Domestic Cook is an exception. Because the occupation of Domestic Cook can require one to two years of proficiency, it is considered to be a "skilled worker" under the immigration law.

(AF 35).

In the instant case the CO suspected mischaracterization of the job as a Domestic Cook rather than a general Houseworker. As in Carlos Uy III, *supra*, "[i]f a labor certification application mischaracterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher skilled domestic cooks rather than lower-skilled domestic positions."

Another factor to consider in determining whether the job was misclassified is the hours that the Alien is expected to work. In the instant case, the Employer argued that the family is occupied by its social and religious activities, and does not have time to prepare meals. However, as the CO stated in the Final Determination, "[t]he evidence […] failed to explain how a Cook arriving almost three hours after the family leaves will prepare three meals for the family on a daily basis. The stated work schedule of the alien and the schedules of the family conflict." (AF 6).[4] With such a schedule, it seems more likely that the Alien is being hired to do other household duties in addition to cooking, rather than solely cook for the family.

Another issue considered in the totality of circumstances test is whether the Employer had previously employed a household cook. If not, it has no reference in determining if the position is full-time. In Carlos Uy III, *supra*, the Board stated, "he [the employer in the case] does not allege that he has used the services of domestic worker whose only duties are cooking related. Thus, he is not in a position to really know whether the position he has described is a full-time job." Thus, the Employer's assertion

[4] In its Request for Review and Statement of Position, the Employer stated that during the day when the family is not present, the Alien will prepare the following day's breakfast and lunch, and thus the position of a Domestic Cook exists. However, as this evidence was presented after the Final Determination was made and was not evidence reviewed by the CO, the Board cannot consider it. The regulation at 20 C.F.R. § 656.27(c), concerning review on the record by the Board, states that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made." The regulation also states that the Board will take into account "the request for review, and any Statements of Position or legal briefs submitted." However, 20 C.F.R. §656.26(b)(4) states that the "request for review, statements briefs and other submissions of the parties […] shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." These regulations exclude the possibility of presenting new evidence before the Board; we will only examine that which the CO reviewed and based the denial decisions on. See Import S.H.K. Enterprises, Inc., 1988-INA-52 (Feb. 21, 1989)(en banc).

in the instant case that the job duties of the cook constitute full-time work is merely guesswork.

Another consideration specified in Carlos Uy III, is whether there is a special connection between the Employer and the Alien. In the instant case, the Alien is the brother of the Employer's sister's husband, and learned of the position through the Employer's sister's husband. Since there is a connection between the Employer and the Alien, the Employer had a greater burden of proving that the job opportunity was clearly open to U.S. applicants.

In the Employer's rebuttal to the Notice of Findings, the Employer references a previous BALCA case, Michael Young, 2000-INA-135 (Sept. 28, 2001), and states that he has "satisfied our [the Board's] burden of proof requirements as set forth" in this case, "in which the Board found that the totality of circumstances supported the existence of a bona fide job opportunity." (AF 12). In Young, however, the Employer proved that there were special circumstances that warranted the employment of a household cook, since the Employer and his son had special nutritional requirements, supported by medical documentation. In the instant case, the Employer did not prove that it had any such special circumstances.

Furthermore, the Employer did not submit any documentation to verify the statements it made in its rebuttal. In its rebuttal to the Notice of Findings, the Employer referenced previous BALCA cases, Raul Garcia, 1989-INA-211 (Feb. 4, 1991) and ARCO Oil & Gas Co., 1989-INA-295 (May 22, 1991), in which the written assertions made by the employers were deemed to be sufficient evidence. However, this authority does not stand for the proposition that the CO *must* accept statements as credible evidence. Mere assertions by the Employer do not suffice as evidence, as the Employer carries the burden of proof. See Analyst International Corp., 1995-INA-131 (May 28, 1996). The CO specifically asked the Employer to provide documentation to support its statements. According to the CO's requests in the NOF, "*The adequacy of the documentation will be key to the evaluation of your application because little weight will*

be accorded to statements alone." (AF 35)(emphasis as in original). See Gencorp., 1987-INA-659 (Jan. 13, 1989)(en banc) (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it). Thus, it was the Employer's responsibility to support its statements with documentation.

Applying the totality of circumstances test, we find that the Employer did not prove that the job opportunity was *bona fide* and clearly open to U.S. workers. Accordingly, we find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.